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In the Supreme Court of the United States

OCTOBER TERM, 1972

DOCKET NO. 72-138

WALTER R. ANDERSON, THEODORE C. ANDERSON, THEODORE C. ANDERSON, as Administrator D.B.N. of the Estate of Eugene W. Anderson, DAVID W. ANDERSON, and LAKELAND DEVELOPMENT CORPORATION, a Minnesota Corporation,
Petitioners,

VS.

LECON PROPERTIES, INC., a Minnesota Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS IN THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Lecon Properties, Inc., a Minnesota Corporation, by Harold M. Fredrikson, its attorney duly authorized, petitions this Court to deny the Writ of Certiorari sought by petitioners herein and filed with this Court on July 24, 1972.

I.

OPINIONS BELOW

In addition to decisions of the United States District Court for the District of Minnesota and the United States Court of Appeals for the Eighth Circuit, the decision of the Minnesota Supreme Court is reported at 288 Minn. 514, 179 N.W.2d 718 (1970).

II.

JURISDICTION

The respondent acknowledges that petitioners are attempting to invoke the jurisdiction of this Court under 28 U.S.C. §1254(1).

III.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the Constitutional Provisions and Statutes set forth in the petition, the following statute is involved: Minn. Stat. §480.04 (1969).

IV.

QUESTIONS PRESENTED FOR REVIEW

The petitioners' statement of the questions presented for review reflects their mistaken analysis of the opinions below and the issues involved therein. The questions stated in the petition should properly be phrased:

1. Whether the institution and prosecution of the action for declaratory relief in the United States District Court constituted an attempt to review on appeal the

decision of the Minnesota Supreme Court where the state court's jurisdiction was clearly premised on the state constitution and statutes and where the petitioners raised the same jurisdictional arguments in the state court proceedings.

2. Whether there is any appearance of error in the opinions below holding that the writ of mandamus issued by the Minnesota Supreme Court was not void for lack of jurisdiction.

3. Whether the petitioners, under the circumstances of this case, are entitled to claim relief under 42 U.S.C. § 1983.

V.

STATEMENT OF CASE

The petitioners sought to invoke the jurisdiction of the District Court under 42 U.S.C. §1983 and requested the District Court to enter a declaratory judgment adjudging and decreeing that a certain writ of mandamus issued pursuant to the per curiam opinion of the Minnesota Supreme Court on July 3, 1970, is null and void for lack of jurisdiction. The District Court dismissed the complaint on the ground that the Minnesota Supreme Court did not exceed its jurisdiction when it issued the writ of mandamus. The Court of Appeals for the Eighth Circuit affirmed the decision of the District Court in a per curiam opinion and thereafter denied a motion for rehearing.

No useful purpose would be served in attempting to recite the facts which are relevant and material to the issues. It may be noted that the said per curiam opinion of the Minnesota Supreme Court, as reported at 179 N.W.

2d 718, sets forth the facts as does the opinion of the United States District Court. The respondent does feel compelled, however, to respond to one factual inaccuracy in the petitioners' statement of the case. The petitioners contend that respondent obtained from the Minnesota Supreme Court numerous extensions of time within which to file its appeal brief and appendix and that such extensions exceeded the six-month period allowed by the lower court judgment for the so-called tender and payment. No such extensions of time were obtained prior to the expiration of the so-called redemption period on November 27, 1969.

VI.

ARGUMENT

From the analysis that follows, the following conclusions are apparent and suggest that this cause does not warrant review by this Court:

A. The judicial determination of the Minnesota Supreme Court and the resulting writ of mandamus was not subject to attack in the United States District Court because the Minnesota Supreme Court had personal jurisdiction, subject matter jurisdiction, and correctly decided the matter within the powers granted to it by the law of its organization.

B. The petitioners are not entitled to relief under 42 U.S.C. §1983 because the respondent did not act "under color of" state law in obtaining the writ of mandamus.

C. This case does not involve any issues of peculiar gravity or of constitutional importance, and the decisions below are not in conflict with decided authority.

A. THE MINNESOTA SUPREME COURT HAD PERSONAL AND SUBJECT MATTER JURISDICTION TO CONSIDER RESPONDENT'S REQUEST AND ISSUE THE WRIT OF MANDAMUS AND THE WRIT WAS PROPERLY ISSUED WITHIN THE POWERS GRANTED TO IT BY THE LAW OF ITS ORGANIZATION.

1. The Minnesota Supreme Court had personal and subject matter jurisdiction to consider and issue the writ of mandamus.

There is no dispute concerning the fact that the Minnesota Supreme Court had personal jurisdiction over the parties. The Court also had subject matter jurisdiction. Article 6, Section 2, of the Constitution of the State of Minnesota and Minn. Stat. §480.04 (1969) (a section of the Minnesota Statutes which the petitioners have consistently failed to cite) clearly indicate that a petition for a writ of mandamus is among the class of actions that the Minnesota Supreme Court is authorized to entertain. Minn. Stat. §480.04 provides as follows:

> The Court *shall have power to issue* to all courts of inferior jurisdiction and to all corporations and individuals, writs of error, certiorari, mandamus, prohibition, quo warranto and all other writs and processes, *whether especially provided for by statute or not, that are necessary to the execution of the laws and the furtherance of justice.* It shall be always open for the issuance and return of such writs and processes and for the hearing and determination of all matters involved therein and for the entry in its minutes of such orders as may from time to time be necessary to carry out the power and authority conferred upon it by law, subject to such regulations as it may prescribe. Any justice of the court, either

> in vacation or in term, may order the writ or process to issue and prescribe as to its service and return. (Emphasis added.)

Thus, the Minnesota Supreme Court had personal and subject matter jurisdiction to consider the respondent's petition for a writ of mandamus, and its decision thereon can be attacked only on grounds of mere error in granting the same, and not, as petitioners contend, on the ground of usurpation of jurisdiction.

2. The Minnesota Supreme Court properly issued the writ within the powers granted to it by the law of its organization.

The petitioners contend that the Minnesota Supreme Court cannot control the exercise of judicial discretion by a writ of mandamus. In support of this proposition they cite Minn. Stat. §586.01. The respondent does not dispute this proposition of law. However, the petitioners argue further that the writ in question did in fact control the judicial discretion of the lower court and it is therefore null and void. The petitioners cite *U.S. to the Use of Wilson v. Walker,* 109 U.S. 258 (1883), in support of the proposition that even though a court may have personal and subject matter jurisdiction, if it makes a decree which is not within the powers granted to it by the law of its organization, such a decree is void. There is no need to analyze the precise holding in *Walker* because the premise of the petitioners is in error.

It is obvious that the writ of mandamus did not operate to control the judicial discretion of the lower court, and therefore the Minnesota Supreme Court did not exceed its jurisdiction when it issued the writ. No other conclu-

sion can be reached. The per curiam opinion is clear and unambiguous. The Minnesota Supreme Court did not purport to control the discretion of the lower state court but rather found that the lower court had no discretion to exercise by virtue of Rule 60.02 of the Minnesota Rules of Civil Procedure under the facts and circumstances of the case. As the Minnesota Supreme Court stated:

> Rule 60.02(6) was not intended to allow the district court to reopen or amend judgments beyond the normal time limit merely because the court feels it has committed some judicial error. *Barrett v. MacDonald*, 264 Minn. 560, 121 N.W.2d 165. (179 N. W.2d at 722).

Thus, the Minnesota Supreme Court issued the writ of mandamus to compel the lower court to discharge its function, *i.e.*, to grant respondent the relief from the judgment to which it was entitled as a matter of right. This is clearly a function of the writ. See Minn. Stat. §586.01 (1969), and the Advisory Committee's Notes pertaining to Rule 120 of the Minnesota Rules of Civil Appellate Procedure, Vol. 27A, Minn. Stat. Annot.

3. The decision of the Minnesota Supreme Court cannot be collaterally attacked in the United States District Court on the basis of mere error, if any, made in the proceedings which led to the judgment.

Even if the Minnesota Supreme Court erred in granting the writ of mandamus, its decision cannot be collaterally attacked in the United States District Court. This general rule is especially applicable in the case at bar

because jurisdiction of the United States District Court is original and not appellate. Many cases may be cited in support of this principle of law, and perhaps the best example is *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). *See also McLain v. Lance*, 146 F.2d 341 (5th Cir. 1945); *H. J. Heinz Co. v. Owens*, 189 F.2d 505 (9th Cir. 1951); *National Cancer Hospital of America v. Webster*, 251 F.2d 469 (2d Cir. 1958).

A corollary to the aforementioned general rule is that if the jurisdiction issue has been raised and decided by one court it cannot be raised for a redetermination in the United States District Court. *See, e.g., Durfee v. Duke*, 375 U.S. 106 (1963); *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939); *Stoll v. Gottlieb*, 305 U.S. 165 (1938); *Baldwin v. Iowa State Traveling Mens Association*, 283 U.S. 522 (1931). The petitioners opposed the respondent's petition in the Minnesota Supreme Court for the writ of mandamus by directly challenging the jurisdiction of the Court to issue the same contending that to do so would be to control the discretion of the lower court. The Minnesota Supreme Court necessarily ruled on the issue when it issued the writ, and petitioners were properly precluded from seeking a redetermination in the United States District Court.

B. THE PETITIONERS ARE NOT ENTITLED TO RELIEF UNDER 42 U.S.C. §1983 BECAUSE THE RESPONDENT DID NOT ACT "UNDER COLOR OF" STATE LAW IN OBTAINING THE WRIT OF MANDAMUS.

The petitioners' entitlement to relief is dependent upon a showing that the respondent acted "under color of" state law within the meaning of 42 U.S.C. §1983 in obtaining the writ of mandamus from the Minnesota Supreme Court. However, it has been held many times that an invasion of an individual's rights by another private individual is not within the purview of §1983, since that section is directed only to state action. *See, e.g., Williams v. Yellow Cab Co.*, 200 F.2d 302 (1st Cir. 1953). The courts have uniformly upheld the firm conclusion that the state must in some manner give to the defendant the appearance of state authority before the "under color of" language of §1983 is satisfied. *A private individual is not deemed to have been clothed with state action merely because he initiates a lawsuit in state court.* The rule is stated in Comment, *Federal Comity, Official Indemnity, and the Dilemma of Section 1983*, 1967 DUKE L. J. 741, as follows:

> The existence of state laws and judicial machinery may provide the vehicle by which private persons are able to deprive others of federal rights. Nevertheless, in such instances, no liability has been found because the state is not considered to have taken an affirmative act which would create an appearance of state authority in a private person. For instance, private individuals who institute legal proceedings in courts provided by the state do not act "under color of" state law, even if by doing so they allegedly violate the federal rights of others. *Id.* at 765.

For cases in accord with this principle, see *Kamsler v. M.F.I. Corp.*, 359 F.2d 752 (7th Cir. 1966); *Harris v. Turner*, 329 F.2d 918 (6th Cir. 1964), *cert. denied*, 379 U.S. 907 (1964); *Kinney v. Johnson*, 319 F.2d 355 (9th Cir. 1963), *cert. denied*, 375 U.S. 908 (1963); *Skolnick v. Martin*, 317 F.2d 855 (7th Cir. 1963), *cert. denied*, 375 U.S. 908 (1963); and *Skolnick v. Spolar*, 317 F.2d 857 (7th Cir. 1963).

C. THIS CASE DOES NOT INVOLVE ANY ISSUES OF PECULIAR GRAVITY OR OF CONSTITUTIONAL IMPORTANCE, AND THE DECISIONS BELOW ARE NOT IN CONFLICT WITH DECIDED AUTHORITY.

It is obvious that the courts below have not decided any federal question of substance which is not in accord with the pronouncements of the United States Supreme Court. Furthermore, the decision by the Court of Appeals for the Eighth Circuit is not in conflict with the decisions of the other circuits in analogous situations involving the same issues. Thus, this case does not warrant review.

VII.
CONCLUSION

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in the Supreme Court of the United States, and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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